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NO. 80-785

IN THE

Supreme Court of the United States

October Term, 1980

CERTAIN UNINDICTED INDIVIDUALS
AND CORPORATIONS,

Petitioners,

V.

UNITED STATES OF AMERICA,
COMMONWEALTH OF VIRGINIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does an assertion that time and effort will be saved, coupled with a blanket request for access to all grand jury materials, satisfy the requirement that a "compelling and particularized need" be shown before a court may divulge secret grand jury materials.

2. If not, does 15 U.S.C. § 15f(b) relieve a state attorney general of having to demonstrate a compelling and particularized need before obtaining confidential grand jury materials.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Certain Unindicted Individuals and Corporations, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 12, 1980.

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, appears in the Appendix hereto. The opinion rendered by the United States District Court for the Eastern District of Virginia also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 12, 1980. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Does an assertion that time and effort will be saved, coupled with a blanket request for access to all grand jury materials, satisfy the requirement that a "compelling and particularized need" be shown before a court may divulge secret grand jury materials.

2. If not, does 15 U.S.C. § 15f(b) relieve a state attorney general of having to demonstrate a compelling and particularized need before obtaining confidential grand jury materials.

STATUTORY PROVISION INVOLVED

United States Code, Title 15:

§ 15f. Actions by Attorney General

> (b) To assist a State attorney general in evaluating the notice or in bringing any action under Sections 12 to 27 of this Title, the Attorney General of the United States shall, upon request of such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under Sections 12 to 27 of this Title.

STATEMENT OF THE CASE

In 1978, a grand jury convened by the United States District Court for the Eastern District of Virginia examined documents and heard testimony from witnesses concerning the alleged collusive practices of automobile body shop operators of Tidewater, Virginia in establishing hourly rates. Seven automobile dealers and the Tidewater Automobile Dealers Association were indicted, plead *nolo contendere*, and were fined. A substantial number of dealers whose records and witnesses were subpoenaed were not indicted. Your petitioners are certain of those unindicted dealers whose records have been produced and whose employees have testified as witnesses.[1] Subsequently, the Attorney General of Virginia moved the district court for an Order authorizing the disclosure of all such grand jury materials to the Attorney General of Virginia. The petitioners herein and others opposed such motion. The district court denied disclosure, and the Court of Appeals for the Fourth Circuit reversed.

REASONS FOR GRANTING THE WRIT

1. THE DISTRICT COURT FOLLOWED THE "COMPELLING AND PARTICULARIZED NEED" STANDARD SET BY THIS COURT FOR THE DISCLOSURE OF GRAND JURY MATERIALS.

A. *The Decision of the District Court*

After oral arguments and submission of briefs, the district court denied disclosure. Its memorandum opinion dated May 23, 1979, is attached. The district court held that the Attorney General of Virginia had failed to show a compelling and particularized need sufficient to outweigh the time-honored rule of grand jury secrecy which protects the innocent accused from public ridicule and the grand jury witness from retaliation. The district court concluded its opinion by stating:

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[1] The identity of the petitioners herein was tendered to the District Court at the institution of these proceedings with the request that the identity be kept *in camera* to avoid local media publicity. The identity will be furnished this Court if requested.

> In this case, many individuals, most of them not necessarily connected with the eight defendants later indicted, came before the grand jury, assured of the secrecy of their testimony, and secure in the promise that they could testify frankly without fear or intimidation. One can assume that many were informed that they were not 'targets' in the investigation itself. The announced rule of the secrecy of their testimony, and the necessity not to break faith with the persons so appearing, in our opinion, far outreaches any compelling need of the Attorney General of Virginia for this Court to broach the time-honored rule of secrecy, and to make available the grand jury testimony just to save him effort and time in conducting an investigation upon which he *may* base antitrust suits.

In reading its conclusion, the district court relied heavily on this Court's opinion in *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979), wherein Mr. Justice Powell stated:

> We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. *(See, e.g., United States v. Proctor & Gamble*, 356 U.S. 677 (1958). [Footnote omitted]. In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure

> that persons who are accused but found innocent by the grand jury will not be held up to public ridicule. [Footnote omitted].

441 U.S. at 218.

The district court analyzed the precise language and Congressional intent of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15(c), and concluded that the language of Section 4F(b) authorizing the United States to turn over to state Attorney Generals "to the extent permitted by law, any investigative files or other materials," continued to vest in the court the discretion to disclose grand jury materials as previously authorized by Rule 6(e) of the Federal Rules of Criminal Procedure. The district court then examined the principles announced by this Court to govern the disclosure of grand jury materials. It acknowledged that the hallmark case was *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958), wherein this Court summarized the reasons for grand jury secrecy as follows:

> (1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Id., at 681-82, n. 6, citing *United States v. Rose*, 215 F. 2d 617, 628-29 (3rd Cir. 1954).

The district court noted that the various interests in maintaining the sanctity of grand jury proceedings must be balanced against the occasional need for litigants to have access to *discreet*

portions of grand jury materials, and that this Court had articulated in *Proctor & Gamble* the following standard for determining when the traditional secrecy of the grand jury may be so breached:

> This 'indispensible secrecy of grand jury proceedings' [citation omitted] must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be shown with particularity.

356 U.S. at 682. The standard was again explained in *Douglas* as follows:

> Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.

441 U.S. at 222.

Having established the "compelling and particularized need" standard, the district court next determined that the Virginia Attorney General had failed to establish a sufficiently compelling and particularized need. There was no showing that the material sought by the Commonwealth was needed to avoid a possible injustice in another proceeding. Nor was the Commonwealth's request limited to certain materials so needed, but instead was an unfocused, blanket request. There was no showing that the need for disclosure was greater than the need for continued secrecy. The Virginia Attorney General stated only that access to the grand jury materials would save him time and effort.

B. *The District Court's Decision Applies the Law As Pronounced by this Court*

The mere expedition of civil discovery has never qualified as a compelling and particularized need. A similar claim of need was raised in *Proctor & Gamble*, where grand jury transcripts were sought to aid in the preparation of a civil antitrust suit. This

Court held that such use was not a particularized or compelling need justifying release of the transcripts, saying:

> The relevancy and usefulness of the testimony sought were, of course, sufficiently established. If the grand jury transcript was made available, discovery through depositions, which might involve delay and substantial cost would be avoided. Yet these showings fall short of proof that without a transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done.

356 U.S. at 682. This Court suggested in that case that a proper use of grand jury transcripts might be to impeach a witness, to refresh his recollection, or to test his credibility, but wholesale disclosure of grand jury records for investigative purposes was improper. *Id.*, at 683.

Similarly, in *ABC Great Stores, Inc. v. Globe Ticket Co.*, 309 F. Supp. 181 (E.D. Pa. 1970), the court said:

> Although I am sympathetic to the plaintiff's position, the law requires that before the need of grand jury secrecy may be lifted, the parties seeking disclosure must demonstrate a more compelling and particularized need than merely expediting civil discovery.

Id., at 183.

In *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, (D. Minn. 1968), the court said that discovery for civil antitrust litigation was not such a "particularized need" as to depart from accepted grand jury secrecy:

> The normal routes of civil discovery will give plaintiffs adequate opportunity to prepare their case. Mere savings of monetary burden will not suffice to bring the court's discretion into play under Rule 6(e).

Id., at 581.

And, in *Application of State of California*, 195 F. Supp. 37 (E.D. Pa. 1961), the court denied motions for release of grand jury material "where the only reasons for disclosure here are the

avoidance of expense and additional work." 195 F. Supp. at 40.

The Virginia Attorney General's efforts below were similar to the offering by the State of Texas which sought to discover the testimony of steel company employees before a grand jury investigation for use in the State's suit against the same firms in *Texas v. United States Steel Corp.*, 546 F.2d 626 (5th Cir.), *cert. denied*, 434 U.S. 889 (1977). The Court of Appeals for the Fifth Circuit undertook the "delicate task of balancing the policy which requires secrecy for the proceedings of the grand jury with the policy which requires that there be full disclosure of all available evidence in order that the ends of justice may be served," citing *Allis-Chalmers Manufacturing Co. v. City of Fort Pierce*, 323 F.2d 233 (5th Cir. 1963). In *Allis-Chalmers*, the court had held that:

> [D]isclosure of grand jury testimony is properly granted where there is a compelling need for such disclosure and such disclosure is required by the ends of justice. Disclosure even in these circumstances must be confined to the limited portions of the testimony for which there is found to be a particularized need.

Id., at 242.

The fifth circuit rejected the argument that possession by a party of his own or his employee's transcript should establish a particularized need sufficient to overcome the need for grand jury secrecy. Because Texas had made no effort to demonstrate the necessity of access to the grand jury materials, either to impeach a witness, to refresh his recollection, or to test his credibility, and because it had made no effort to limit its request to particular materials for which such a need could be shown, the action of the trial court in granting discovery was reversed as an abuse of discretion.

The fifth circuit emphasized that it was not incumbent upon those urging the denial of disclosure to demonstrate the need for secrecy. The need for secrecy is *presumed*, and the test for disclosure is based solely upon the demonstrated need therefor. The court said:

> The State underrates the importance of and misconceives the reasons for the cloak of grand jury secrecy: Although several reasons exist, the most pertinent to this case is the desire to create a sanctuary, inviolate to any intrusion except on proof of some special and overriding need, where a witness may testify, free and unfettered by fear of retaliation.

546 F.2d at 629.

To the same effect is *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 486 (E.D. Pa. 1962), where the court held that the test for disclosure is not determined by "the negative fact that there may be no immediate need for secrecy, but only by the positive need for disclosure." *Id.*, at 489. The court stated:

> And there can be no policy in favor of disclosure unless there is particular need. The lack or improbability of harm is but a factor in the evaluation of the need for secrecy. It is not a factor demonstrating a need for disclosure. While the need for secrecy may not be apparent in our particular case, it must be kept in mind that there is a general policy, fundamental and historically supported, which demands secrecy. Secrecy must still prevail in the absence of a *particular compelling need.*

Id., at 489.

The Virginia Attorney General's cry that grand jury materials are necessary to its efforts is particularly weak in this case because the Virginia legislature has provided the Attorney General with an advantage in investigating contemplated lawsuits which is not shared by other civil litigants - the Attorney General has been empowered by the legislature to issue civil investigative demands pursuant to the following statutory provision:

> In connection with any such investigation, the Attorney General, or his designee, is empowered to issue a civil investigative demand to witnesses by which he may (i) compel the attendance of such witnesses, (ii) examine such witnesses under oath before himself or a

> court of record; (iii) subject to subsection (c) of this section, require the production of any books or papers that he deems relevant or material to the inquiry; and (iv) issue written interrogatories to be answered by the witness served or, if the witness served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the witness.

VA. CODE § 59.1-9.10 (1973 Repl. Vol.).

Thus, it is clear that the Virginia Attorney General's desire to save time and effort by obtaining the grand jury materials is not a compelling need sufficient to outweigh the rights of the innocent accused and witnesses who testified under solemn assurance of secrecy.

Furthermore, the Virginia Attorney General's request was not particularized. In *Douglas* this Court recalled that the test which it had set forth in *Proctor and Gamble* was two-prolonged—the party seeking to obtain grand jury transcripts must demonstrate both a *compelling* and a *particularized* need. That party must demonstrate that "without the transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done." *Proctor and Gamble*, 356 U.S. at 682, quoted in *Douglas*, 441 U.S. at 221. In addition, the Court required that the showing of need for the transcripts be made "with particularity" so that "the secrecy of the proceedings [may] be lifted discreetly and limitedly." *Id.* Summarizing, this Court stated the emerging standard for determining when the traditional secrecy of the grand jury may be broken:

> Parties seeking grand jury transcripts under Rule 16 must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.

441 U.S. at 222.

The Court further recalled:

> As noted in *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 683 (1958), the typical showing of particularized need arises when a litigant seeks to use 'the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like.' Such use is necessary to avoid misleading the trier of fact. Moreover, disclosure can be limited strictly to those portions of a particular witness' testimony that bear upon some aspect of his direct testimony at trial.

Id., at 222 no. 12.

This Court noted with approval in *Douglas* the coordination procedures established by Judge Clary in the Electrical Equipment Cases. *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 286 (E.D. Pa. 1962). Following the convictions of twenty-nine heavy electrical equipment manufacturers for price fixing, about nineteen hundred private-damage suits were filed in thirty-four federal districts around the country. Judge Clary outlined a procedure whereby requests for grand jury minutes could be evaluated. The importance of the *particularization* requirement is underscored by this Court's recitation of Judge Clary's words:

> The Grand Jury transcript of any witness deposed in [these suits], either in this district or in any other district of the United States in which these cases are pending, should be made available to the deposition Judge for use in his district. There may be and probably will be many instances during these national depositions when disclosure may be advisable . . . The refusal [to order disclosure in this case] cannot rule out production where *in camera* examination by a deposition Judge uncovers a material discrepancy or significant facts which the witness concealed, or failed to remember, at his deposition. Such disclosure as is necessary to uncover full and complete facts must be allowed. If, at the completion of any deposition taken

> in the national program, a motion is made for the production of that witness' Grand Jury testimony, and if the deposition Judge requests it from this Court for examination in camera, the testimony will be immediately made available to him. The deposition Judge may then contrast the Grand Jury testimony with the deposition and determine, in his own discretion, whether in the interest of justice there is a compelling need for disclosure.

Id., at 291, quoted in *Douglas*, 441 U.S. at 227.

In contract to that carefully circumscribed procedure for releasing grand jury materials endorsed by this Court, is the Virginia Attorney General's wholesale demand for all materials collected during the entire investigation. Instead of item-by-item testing of particularized requests by a federal judge *in camera*, the Virginia Attorney General contemplates a blanket release to him of the materials, with no effort having been made to determine whether the information is available elsewhere and before any effort whatsoever to obtain any information concerning the alleged violations independent of the work of the grand jury.[2] Indeed, it was impossible for the Virginia Attorney General to demonstrate to the district court a compelling and particularized need because the Attorney General was planning to use the grand jury materials as the *first step* in its investigation.

This Court found in *Douglas* that the district court there had abused its discretion in releasing directly to civil plaintiffs grand jury materials where that court lacked sufficient knowledge of the civil suits to accurately weigh the relative needs for secrecy and disclosure. 441 U.S. at 228. This Court criticized the limited analysis made by that district court because its comparison "of the criminal indictment and the civil complaints did not indicate unambiguously what, if any portions of the grand jury transcripts would be pertinent to the subject of the [civil] actions . . . " *Id.*, at 229. This Court was rightly concerned with the possibility of an unnecessary breach of grand jury secrecy, and indicated that use

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[2] Despite specific tools for doing such preliminary investigative work provided by the Virginia General Assembly.

of the grand jury transcripts as a mere mechanism for general discovery would be inappropriate. *Id.* It was also concerned that conflicts between statements in the criminal proceedings and statements in the civil proceedings had not ripened at deposition or trial testimony. *Id.*, at 230.

In the instant situation, the district court suffered under an even greater handicap. There was no way that the district court could compare discrete portions of the grand jury testimony to possibly contradictory statements made in connection with the later civil proceedings, because the Virginia Attorney General had not yet taken any depositions, propounded any interrogatories, or indeed initiated any investigation whatsoever. Under such circumstances, the need for disclosure cannot possibly be measured, and the need for continued secrecy must be presumed to prevail.

This Court in *Douglas* objected to a district court's deciding upon the release of grand jury materials where the civil proceedings were pending in a different court, and it was "unlikely to have dependable knowledge of the status of, and the needs of the parties in, the civil suit in which the desired transcripts are to be used." 441 U.S. at 231. In the instant situation, *no court* has *any knowledge* of the needs of the Virginia Attorney General. The Virginia Attorney General does not even know whether the information contained in the grand jury materials might be available elsewhere without the necessity of breaking faith with grand jury witnesses. Under such circumstances, to permit the release of grand jury materials is to say that state attorneys general are no longer required to make any showing whatsoever, and that disclosure will be automatic on their request. The express words of the Hart-Scott-Rodino Act and the legislative history thereof belie such a reading, and such interpretation would moreover be in direct conflict with this Court's often announced policy of permitting disclosure only when absolutely necessary, and then limited to those discreet portions of the materials without disclosure of which an injustice would be done.

2. THE DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ABOLISHES THE STANDARDS SET FORTH BY THIS

COURT AND STRIPS GRAND JURY MATERIALS OF THEIR CONFIDENTIALITY WITHOUT SUFFICIENT JUSTIFICATION.

A. *The Decision By the United States Court of Appeals For the Fourth Circuit*

The United States Court of Appeals for the Fourth Circuit reversed, holding that the requirement of a showing of "particularized need" is not necessary where the applicant for disclosure is the chief law enforcement officer of the state. The opinion is attached. In the fourth circuit's view, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 relieves the state of such requirement.

Section 4F(b) of the Act provides as follows:

> To assist a State attorney general in evaluating the notice or in bringing any action under Sections 12 to 27 of this Title, the Attorney General of the United States shall, upon request of such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under Sections 12 to 27 of this Title.

15 U.S.C. § 15f(b).

The very language of the statute belies the fourth circuit's interpretation. As noted by the district court, the phrase "to the extent permitted by law" refers the parties, in the case of grand jury materials, to the pre-existing standards for disclosure set forth in Rule 6(e). FED. R. CRIM. P. 6 (e).

Nor does such reading in any way strip Section 4F(b) of meaning. The Rule 6(e) limitation on disclosure of grand jury transcripts, which is incorporated into § 4F(b) by the phrase "to the extent permitted by law," does not apply to the vast array of information and materials collected by the U.S. Attorney General other than through the grand jury mechanism. Indeed, in this case, numerous interviews of principals and witnesses were conducted by the Justice Department outside the context of the grand jury. It is the summaries of those interviews, and similar

materials, which § 4F(b) mandates be turned over to the state attorney general to help him launch his parens patria lawsuit.

Had Congress intended that grand jury materials requested by State attorneys general would no longer be subject to the rules of disclosure of Rule 6(e), it seems likely that Congress would have specifically provided for the repeal of that fundamental and time-honored policy. This expectation seems especially fair where the apparent incorporation in § 4F(b) of the pre-existing rules was called to the lawmakers' attention. During the final Senate debate on the Hart-Scott-Rodino Act, Senator Abourezk said about § 4F(b):

> The section specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. *Under existing law, he cannot turn over materials given in response to a grand jury demand or to a civil investigative demand.* Therefore, the section is limited by existing law to cases where materials were turned over voluntarily.

122 Cong. Rec. § 15,333 (daily ed. Sept. 7, 1976). [Emphasis supplied].

Nor is the District Court alone in interpretating § 4F(b) in accordance with Senator Abourezk's remarks. Other tribunals which have passed upon the same question have similarly reaffirmed the requirement of a demonstration of compelling and particularized need. The court in *In The Matter of Grand Jury Which Presented Criminal Indictments 76-149 and 77-72*, 469 F. Supp. 666 (M. D. Pa. 1978) said:

> [W]e do not read 'investigative files or other materials' as including grand jury materials nor do we believe the statute [4F(b)] was intended to repeal Rule 6(e) or the time-honored policy of grand jury secrecy.

Id., at 671.

Similarly, in *Little Rock School District v. Borden, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,809 (E.D. Ark. 1979), the State of Arkansas was required to demonstrate a compelling and particularized need before disclosure of grand jury materials would be

ordered by the court. Arkansas failed in that effort, and its request was denied. Arkansas contended, as did the Virginia Attorney General, that the release of the transcripts of all witnesses who appeared before the grand jury was authorized under Rule 6(e) by § 4F(b). Arkansas cited the same legislative history urged to the fourth circuit by Virginia (Va. Br. 13) as evidencing a congressional intent to abrogate the normal grand jury rules of secrecy to aid State attorneys general, as follows:

> Section 4F promotes parens patriae actions as a major aspect of antitrust enforcement by encouraging Federal-State cooperation . . . Whenever a State attorney general so requests, in order to evaluate the notice from the U.S. Attorney General or in order to bring a parens patriae action, Section 4F(b) requires the U.S. Attorney General to make the Justice Department's investigative files available to the State attorneys general 'to the extent permitted by law'. This means that the files are to be made available except where specifically prohibited.
>
> Section 4F(b) reflects the Committee's desire that the Federal Government cooperate fully with the State antitrust enforcers.

H.R.REP. NO. 94-4999, 94th Cong., 2nd Sess. 17, (1975) *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2586.

The court in *Little Rock* found that the legislative history did not support such argument, and was unpersuaded, reasoning as follows:

> As defendants point out, 'specific prohibitions' do exist with regard to the release of grand jury testimony and there is no expression in legislative history to counter the seemingly plain intent of the statutory language not to abrogate longstanding policies with regard to grand jury secrecy. In addition, grand jury transcripts are *not* 'investigative files' of the Attorney General, albeit that the government has access to the testimony. Rather, the grand jury is an arm of the

Court, and the transcripts of its proceedings, other than for use in a federal criminal prosecutorial function, may be disclosed *only* by court order. Rule 6(e), Federal Rules of Criminal Procedure. In short, plaintiff's reading of § 4F(b) is untenable. The reasoning in *In Re Montgomery County Real Estate Antitrust Litigation*, 452 F. Supp. 54, 61-62 (D. Md. 1978), is unpersuasive.

At p. 78, 720.[3]

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[3] The reasoning in *U.S. v. B. F. Goodrich, Co.*, 619 F.2d 798 (9th Cir. 1980) is also unpersuasive. the 9th Circuit correctly identified the question—whether because § 4F(b) limits disclosure "to the extent permitted by law" the states must show a particularized and compelling need before grand jury materials will be disclosed, or whether § 4F(b) creates an exception to this requirement. The court then stated that the legislative history was "equivocal on this point", identifying, on the one hand, the remarks made during the senate debate and, on the other hand, the following excerpt from the House Committee report:

> A new federal antitrust remedy will permit the State attorneys general to recover monetary damages on behalf of State residents injured by violations of the antitrust laws. the [Hart-Scott-Rodino Act] is intended to compensate the victims of antitrust offenses, to prevent antitrust violators form being unjustly enriched, and to deter future antitrust violations.

H. R. REP. NO. 94-99, 94th Cong. 1st Sess. 3, *reprinted in* [1976] U.S. CODE CONG. AND AD. 2572. Petitioners herein have no quarrel with that stated purpose of the Act, but see nothing in the statement which in any way indicates that the showing of compelling and particularized need should no longer be required. The 9th Circuit refers additionally to the discussion of the meaning of "to the extent permitted by law" in the House report which states: "This means that the files are to be made available except where specifically prohibited." H. R. REP. NO. 94-499, 94th Cong. 2nd Sess. 17, *reprinted in* [1976] U.S. CODE, CONG. AND AD. NEWS 2586. The "specific prohibition" is, of course, found in Rule 6(e)(2):

> *General rule of secrecy.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3) (A) (ii) of this sub-division shall not disclose matters occuring before the grand jury, except as otherwise provided for in these rules.

CONCLUSION

If the Virginia Attorney General gains access to the grand jury materials, no protective order will suffice in preserving the secrecy of the grand jury proceedings. The latitude of the discovery rules under the Federal Rules of Civil Procedure will clearly render these grand jury materials discoverable, and the testimony of witnesses who spoke without fear or favor will be known to the civil defendants. The very thing that these witnesses were told would not happen - the disclosure of their identities to those against whom they testified in front of the grand jury - will in fact happen, and the federal court will have broken faith with the witnesses it found to testify.

The rules regarding grand jury secrecy have been rewritten by the Fourth Circuit, and, absent reversal, can be summarized as follows: A witness' testimony will be secret, as promised, unless a compelling and particularized need for its disclosure is shown, *or* unless a State Attorney General requests to see it, in which case it will be given to him without any showing of need. Thereafter, if the Attorney General files a civil suit, the persons against whom the testimony was given will have access to it through discovery.

FED. R. CRIM. P. 6(e)

Nothing in the legislative history in any way indicates any change in the exceptions to the general rule of secrecy or in the standards long settled by this Court for invoking the exceptions. The 9th Circuit has ignored the legislative history of this statute and rejected the policies articulated by this Court in favor of its own unsupported interpretation. Indicative of the shallow treatment afforded this critical issue by the 9th Circuit is its holding that "the Attorney General need not disclose the materials if he objects to their disclosure." Such restriction can no more be squared with the mandate that "the Attorney General of the United States *shall*, upon request by . . . State Attorney General, make available to him" than can the 9th Circuit's holding that the Attorney General can elect to make the material available without a showing of particularized and compelling need be said to be consistent with the language "to the extent permitted by law."

Congress did not intend such a result, nor do the prior pronouncements by this Court indicate that it will be countenanced here. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

/s/ Richard B. Spindle, III

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APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PUBLISHED

No. 79-5237

United States of America, Commonwealth of Virginia, — Plaintiff, Appellant,

-versus-

Colonial Chevrolet Corporation, Hoff Cadillac Incorporated, Phillips Oldsmobile, Incorporated, Phillips Mercury-Lincoln, Incorporated, Kimnach Ford, Incorporated, Cavalier Ford, Incorporated, Atlantic AMC/Jeep, Incorporated, Tidewater Automobile Dealers Association, and Several unnamed individuals and corporations, — Appellees.

No. 79-5238

United States of America, Commonwealth of Virginia, — Appellant, Plaintiff,

-versus-

Colonial Chevrolet Corporation, Hoff Cadillac Incorporated, Phillips Oldsmobile, Incorporated, Phillips Mercury-Lincoln, Incorporated, Kimnach Ford, Incorporated, Cavalier Ford, Incorporated, Atlantic AMC/Jeep, Incorporated, Tidewater Automobile Dealers Association, and Several unnamed individuals and corporations, — Appellees.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk.
John A. MacKenzie, District Judge.

Argued: February 7, 1980 Decided: August 12, 1980

Before WINTER, RUSSELL and SPROUSE, Circuit Judges.

John B. Russell, Jr., Assistant Attorney General (Marshall Coleman, Attorney General, Joseph W. Kaestner, Assistant Attorney General, Antitrust Unit on brief) for Appellant Commonwealth of Virginia; Peter L. De La Cruz, Department of Justice (James R. Weiss, Department of Justice; John H. Shenefield, Assistant Attorney General; Barry Grossman, Department of Justice on brief) for Appellant United States of America; David F. Peters (Joseph M. Spivey, III, Priscilla A. Burbank, Hunton & Williams on brief) for Tidewater Automobile Dealers Association; (Joseph L. Lyle, Jr., Pickett, Spain & Lyle on brief) for Hoff Cadillac, Inc.; (Guilford D. Ware, Crenshaw, Ware & Johnson on brief) for Cavalier Ford, Inc.; (Hunter W. Sims, Jr., Canoles, Mastracco, Martone, Barr & Russell on brief) for Phillips Mercury-Lincoln, Inc.; (William R. O'Brien, Brydges, Hudgins, Ege, Burt & O'Brien on brief) for Kimnach Ford, Inc.; Guy R. Friddell, III (Richard B. Spindle, III, Thomas G. Johnson, Jr., Willcox, Savage, Lawrence, Dickson & Spindle, P.C. on brief) for Certain Unindicted Individuals and Corporations; (Robert Abrams, Attorney General of the State of New York; Shirley Adelson Siegel, Solicitor General, John M. Desiderio, Assistant Attorney General, Chief, Anti-Monopolies Bureau; Michael J. Landron, Deputy Assistant Attorney General on brief) for the State of New York as Amicus Curiae; (Stephen H. Sachs, Attorney General, George A. Nilson, Deputy Attorney General, Charles O. Monk, II, Assistant Attorney General, and Chief, Antitrust Division, Timothy J. Shearer, Assistant Attorney General on brief) for the State of Maryland as Amicus Curiae.

RUSSELL, CIRCUIT JUDGE:

This is an appeal from a denial of a petition for disclosure of grand jury materials in a concluded successful antitrust prosecution, as sought by the State Attorney General of Virginia, and the Attorney General of the United States, under the provisions of Section 15f(b), 15 U.S.C. We reverse.

To a federal antitrust indictment, charging the appellee Tidewater (Virginia Automobile Dealers Association, along with certain members of that Association (also appellees in this proceeding) with engaging in a price-fixing conspiracy in connection with charges for auto body repairs, the defendants-appellees plead *nolo contendere*. The district court accepted the plea. Under the terms of Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which was "expressly adopted to create 'an effective mechanism to permit consumers to recover damages for conduct which is prohibited by the Sherman Act, by giving State attorneys general a cause of action [to sue as *parens patriae*] on behalf of the States' citizens] against antitrust violators,' "[1] the Attorney General of the United States is required "[w]henever [he] has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action [under this *parens patriae* authority] based substantially on the same alleged violation of the antitrust laws" to "promptly give written notification thereof

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[1] This is the description of the Act as set forth by Justice Brennan in his dissenting opinion in *Illinois Brick Co. v. Illinois*, (1977) 431 U.S. 720, 756.

In his report on the final bill as submitted by the conferees the Senate floor leader for the bill described this part of the bill thus:

> "Title III is the legislative response to the present inability of our judicial system to afford equal justice to consumers for violation of the antitrust laws." 122 Cong. Rec. at 29148, September 7, 1976.

The Act has been extensively discussed in Scher, *Emerging Issues Under the Antitrust Improvements Act of 1976*, 77 *Col. L. Rev.* 679 (1978), and Kintner, Griffin and Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 *Geo. Wash. L. Rev.* 1 (1977-78). Neither article, however, touches on the specific problem involved in this proceeding.

to such State attorney general."[2] Obedient to this statute the Attorney General of the United States notified the Virginia Attorney General of the successful prosecution of the appellees for a violation of the Sherman Act.

This same Title of the Act further provided that in order "[t]o assist a State attorney general in evaluating the notice [of the federal antitrust action] or in bringing any [*parens patriae*] action . . . the Attorney General of the United States shall, upon request of such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action . . . "[3] The Attorney General of Virginia requested the Attorney General of the United States under this authorization to make available to him "all grand jury materials in the files of the United States Department of Justice which relate to the investigation of possible antitrust violations by automobile body shops in the Tidewater area [of] Virginia" and for access to the bills of particulars filed by the United States in the Sherman act prosecution. In connection with this request, the Attorney General of Virginia, joined by the Attorney General of the United States, moved the district court, which had had jurisdiction over the federal criminal prosecution herein, for disclosure, subject to appropriate protective clauses, of "all grand jury materials in the files of the United States Department of Justice which relate to the investigation of possible antitrust violations . . . involved in *United States v. Colonial Chevrolet Corp., et al.*, Crim. No. 78-0016N," and for "access to the bill of particulars . . . currently under seal by Order of this Court." Notice of this motion was given the appellees. They entered objections to the motion. After a hearing on the motion, the district court denied the motion; the Attorney General of the United States and the Attorney General of Virginia have appealed.

The point at issue on the motion was the right of the Attorney General to disclose to the Attorney General of Virginia, under the terms of the Hart-Scott-Rodino Act, all the grand jury materials,

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[2] 15 U.S.C. § 15f(a).

[3] 15 U.S.C. § 15f(b).

including the transcript of testimony and the bill of particulars in his possession in connection with or related to the federal antitrust prosecution of the appellees. In denying disclosure the district court held that grand jury transcripts are not "investigative files" within the meaning of that term in the Act and are not, therefore, embraced within the Attorney General's statutory right to disclose but that, if they are "investigative files" under the Act, their disclosure by the Attorney General is allowed only "to the extent permitted by law," *i. e.*, as permitted by Rule 6(e), Fed.R.Crim.P., which, under the decisions applying such Rule, requires a showing of "particularized need" by the party seeking disclosure. It also found that a "particularized need" would not comprehend assisting in actual or potential civil antitrust litigation. Since the purpose of the State Attorney General in seeking disclosure was for the purpose of assisting in potential antitrust litigation, the petitioner Attorney General of Virginia had not shown the necessary "particularized need" required for disclosure, and the application for disclosure was denied.

Though not set forth in this sequence in its opinion, the reasoning by which the district court justified denial of disclosure begins logically with its conclusion that "investigative files," as that term is used in the statute, does not embrace grand jury proceedings.[4] We, however, do not agree with this narrow definition of the term "investigative files." In our opinion this construction of the term in the statute is plainly contrary to the legislative purposes of the statute involved. In Title III of the Act the Congress was manifestly seeking to encourage *parens patriae* suits by State attorneys general in order to "assist" in the public enforcement of the antitrust laws for the benefit of small consumers. To this end it sought to make available for the use of the State Attorney General, to the full extent permitted by law, all the materials developed in the federal investigation of the alleged antitrust

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[4] The district court found support for its view in *Matter of Grand Jury*, (M.D.Pa. 1978) 469 F.Supp. 666, 671; *Little Rock School District v. Borden, Inc.*, (E.D.Ark. 1979) 1979-2 Trade Cases (CCH) ¶ 62,809; *contra U.S. v. B. F. Goodrich Co.*, 1978-2 Trade Cases (CCH) ¶ 62,389 (N.D. Cal. 1978), *aff'd., In Re Montgomery County Real Estate, Etc.*, (D.Md. 1978) 452 F. Supp. 54.

violation. The use of grand jury proceedings as an "investigative" instrument in antitrust enforcement is well recognized.[5] Often the grand jury investigation is the most important part of the "investigative file" in an antitrust proceeding.[6] The assistance which Congress sought to provide by this statute for State attorneys general in maintaining *parens patriae* antitrust suits would frequently be negligible if the grand jury materials were to be excluded from the "investigative files and materials" which the Attorney General of the United States was authorized to make available to a State attorney general. It is unlikely in the extreme that Congress intended to exclude such materials from the statutory definition of investigative files. We are satisfied that grand jury transcripts in the possession of the Department of Justice fall clearly within the term "investigative files and materials," as used in the statute. And this is the conclusion reached by the only other United States Court of Appeals which has confronted this issue.[7]

We are mindful that Senator Abourezk, who was handling on the floor the 1976 Act for the Judiciary Committee, did during the final Senate debate on the Act state in reference to the specific provision of the Act with which we are concerned:

> "The section specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. *Under existing law* he cannot turn over materials given in response to a grand jury demand or to a civil investigative demand."[8] (Emphasis added)

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[5] *See* Antitrust Adviser, § 9.6, p.602 et seq., 2d Ed. 1978 (Shepard); Unlike, *Discovery of Grand Jury Transcripts in Civil Antitrust Cases in the Seventh Circuit: Fair Use or Abuse? 66 Ill. Bar J.* 706, n.1 (1978), quoting Assistant Attorney General Baker.

[6] See Wilson and Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods*, 14 *Am. Crim. L. Rev.* 651 at 683-690 (1977).

[7] *United States v. B. F. Goodrich Co.*, (9th Cir. 1980) _____ F. 2d _____.

To the same effect is the late Judge Blair's carefully reasoned opinion in *In Re Montgomery County Real Estate, Etc.*, 452 F.Supp. 54, n. 5.

[8] *See* 122 Cong. Rec. at 29160, September 7, 1976.

The district court would read into this language a categorical declaration by the Senate floor leader for the bill that "investigative files," as used in the statute in question, did not include grand jury proceedings. It apparently assumed that "existing law," as referred to by Senator Abourezk, was an absolute bar to the disclosure of grand jury materials. All that Senator Abourezk was saying, however, was that under existing law (*i. e.*, under Rule 6(e) Fed.R.Crim.P.) the Attorney General could not *voluntarily* turn over such proceedings to the State attorney general. That statement is perfectly true and the appellants so concede. The disclosure of grand jury proceedings must be authorized by the court, and the circumstances under which they may be disclosed are set forth in detail. We so declared in *In Re Grand Jury Subpoenas, April, 1978, Etc.*, (4th Cir. 1978) 582 F.2d 1103, 1108-9, *cert. denied,* 440 U.S. 971. Such is the reason the appellants filed their petition in the district court. But the court "under existing law" may authorize disclosure under the circumstances detailed in Rule 6(e)(3); in fact it has done so in many cases in support of proceedings in both federal and state judicial, and even in state administrative, proceedings.[9] The language of Senator Abourezk thus presents no impediment to authorizing disclosure in a proper case meeting the criteria stated in Rule 6(e)(3).

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[9] In *Antitrust Law Developments,* prepared by the Antitrust Section, American Bar Association (1975), the authors have listed many instances in which the courts have granted disclosure of grand jury materials covering concluded antitrust prosecutions in aid of *private* antitrust actions. For typical instances *see Illinois v. Sarbaugh,* (7th Cir. 1977) 552 F.2d 768, 774-78, *cert. denied, sub.nom., J. L. Simmons Co. Inc. v. Illinois,* 434 U.S. 889; *Consolidated Edison Co. of N.Y. v. Allis-Chalmers Mfg. Co.,* (S.D.N.Y. 1963) 217 F. Supp. 36, 38; *State of Washington v. American Pipe & Construction Co.,* (1966) 41 F.R.D. 59, 63; *In Re Cement-Concrete Block, Chicago Area,* (N.D. Ill. 1974) 381 F. Supp. 1108, 1111; *United States v. General Motors Corporation,* (E.D.Mich. 1973) 352 F. Supp. 1071, 1072.

For illustrations of authorized disclosures of grand jury materials in State proceedings, *see Doe v. Rosenberry,* (2d Cir. 1958) 255 F.2d 118 (disclosure to grievance committee of a state bar); *Matter of Disclosure of Testimony, Etc.,* (8th Cir. 1978) 580 F.2d 281 (disclosure to municipality investigating judicial misconduct); *In Re 1979 Grand Jury Proceedings,* (E.D.N.Y. 1979) 479 F. Supp. 93 (disclosure in connection with investigation of bribery of municipal employees).

It must be remembered, too, that the language in the Act providing for disclosure originated in the House and not the Senate and that the inclusion of such language in the final enactment was, as Senator Abourezk freely conceded, at the instance of the House conferees.[10] The House left no doubt of its intention in including this language, the House Committee Report said that the section "reflect[ed] the committee's desire that the Federal Government cooperate fully with State antitrust enforcers" and that the language which said that "the Justice Department's investigative files [were to be made] available to the State attorney general 'to the extent permitted by law'" meant that "the files [were] to be made available except where specifically prohibited."[11] It is clear from this authoritative statement of the inten-

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[10] *See* note 8.

[11] The exact language of the Report is as follows:

> "Section 4F promotes parens patriae actions as a major aspect of antitrust enforcement by encouraging Federal-State cooperation. The section provides that whenever the United States has brought suit in its proprietary capacity under § 4A of the Clayton Act, and the U.S. Attorney General believes that the same antitrust violation may have given rise to potential parens patriae claims, he shall notify the appropriate State attorneys general. Whenever a State attorney general so requests, in order to evaluate the notice from the U.S. Attorney General or in order to bring a parens patriae action, section 4F(b) requires the U.S. Attorney General to make the Justice Department's investigative files available to the State attorneys general 'to the extent permitted by law.' This means that the files are to be made available except where specifically prohibited.
>
> "Section 4F(b) reflects the committee's desire that the Federal Government cooperate fully with State antitrust enforcers.
>
> "The benefits of increases in Federal-State cooperation and coordination of antitrust enforcement are obvious, and are achieved in H.R. 8532 without the expenditure of additional Federal funds."
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> H.R.No. 94-499, 94th Cong., 2d Sess. 17 (1975), reprinted in 1976 U.S. Code, Cong. & Admin. News, at pp. 2586-87.
>
> It is true this statement was in a Report on an earlier version of the Act. But the only distinctions between the section § discussed in House Report No. 94-499, and the present law are: (1) under the earlier version access was granted to the United States Attorney General's files (other than to evaluate

tion of the statute's drafters in the House that only matters, disclosure of which were "specifically (or absolutely) prohibited" were without the term "investigative files" in the statute. We are persuaded that this represents the proper construction of the statute to be followed by us in this decision.

The question thus becomes whether disclosure of grand jury proceedings is "specifically prohibited" by Rule 6(e), Fed. R.Crim.P. In resolving this issue we note at the outset that, as has been often observed, the Rule is not an absolute bar to or prohibition of the disclosure of grand jury proceedings. *Special February 1971 Grand Jury v. Conlisk*, (7th Cir. 1973) 490 F.2d 894, 896. The drafters of Rule 6(e) recognized that there could be situations in which there would be ample justification for access by other parties to the grand jury transcripts, and the Rule, as finally approved, provided for disclosure under various circumstances, including "when so directed by the court preliminarily to or in connection with a judicial proceeding," found to justify disclosure. Rule 6(e)(2)(C)(i); *Douglas Oil Co. v. Petrol Stops Northwest*, (1979) 441 U.S. 211, 220. And release for use in state, as well as infederal, judicial, and perhaps administrative, proceedings, has been authorized under this specific exception to the general rule of secrecy accorded grand jury proceedings.[12]

But the district court, while recognizing that there was authority to grant access under this "preliminarily to . . . judicial proceeding" exception, found that the Supreme Court has established certain strict requirements to be met before the court might authorize disclosure thereunder, and that the petitioners here, the State Attorney General of Virginia, and the Attorney General of the United States, had not satisfied those requirements. It is true

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notice) only for purposes of bringing an action under 4C, 15 U.S.C. § 15c (1976) (the *parens patriae* damage provision): the enacted version requires access for purposes of "bringing any action under this [the Clayton] Act" (emphasis added) and (2) under the earlier version the "usage clause" was conjunctive: "To assist a State attorney general in evaluating the notice *and* in bringing any action . . ." (emphasis added); this dual foundation for disclosure of investigative and other materials was changed in the enacted section by substituting "or" for "and."

[12] *See* cases cited in note 9.

that the Supreme Court has, as the district court pointed out, established certain standards to be used by district courts in exercising their discretionary authority to order disclosure under this "preliminarily to . . . judicial proceeding" exception when such disclosure is sought *by private parties engaged in private litigation.*[13] In that context (*i. e.*, in the application of a private litigant or party), it is true that it was the Supreme Court's holding that a party seeking disclosure must meet the burden of demonstrating that "the need for [disclosure] outweighs the public interest in secrecy . . ."[14] To satisfy this burden, the applicant for disclosure had to show a "particularized need,"[15] which might not be a need for assistance in maintaining private litigation.[16] In evaluating that asserted need as against "the public interest in secrecy," the weight of the need, the Supreme Court concludes, will increase or diminish in proportion as the reasons supporting the public interest in secrecy increase or diminish.[17] Thus, where

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[13] *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U. S. 211; *Dennis v. United States*, (1966) 384 U.S. 855; *United States v. Proctor & Gamble Co.*, (1958) 356 U.S. 677.

Dennis was a criminal case in which the defendant sought disclosure. The court in that case, however, elaborated on the holding in *Proctor & Gamble* and its conclusions were discussed in *Douglas Oil*.

[14] 441 U.S. at 223.

[15] 441 U.S. at 221.

[16] *In Re Special March 1974 Grand Jury, Etc.*, (7th Cir. 1976) 541 F.2d 166, 170, n.3, *cert. denied*, 430 U.S. 929.

[17] The reasons for grand jury secrecy were summarized in *United States v. Rose*, (3d Cir. 1954) 215 F.2d 617, 628-29:

> "(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation or perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect

the grand jury proceedings are current, the reasons for secrecy will be overwhelming against the need for disclosure. *In Re Bonanno*, (2d Cir. 1965) 344 F.2d 830, 834.[18] Similarly, the public interest and fundamental fairness to the "innocent accused" will operate to deny disclosure where the grand jury has returned a "no bill;"[19] in fact, this is stated as one of the basic reasons for the rule of grand jury secrecy. *See United States v. Rose*, 215 F.2d 628-29. But when the grand jury has completed its work and the criminal proceedings initiated by the grand jury indictment have been concluded, the reasons for secrecy, in the opinion of the Supreme Court, are substantially diminished and correspondingly the requirement of a showing of "particularized need" as a basis for disclosure is diminished. *Illinois v. Sarbaugh*, 552 F.2d at 774, cited with approval in *Douglas Oil*, 441 U.S. at 223.[20]

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innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

This statement of the basis for grand jury secrecy was cited with approval in *Douglas Oil Co.*, 441 U.S. at 219, no. 10.

[18] In this case the court said:

"Moreover, we have not been referred to a single case authorizing disclosure of a witness' testimony *during the pendency of grand jury investigations* . . ." (Emphasis in text.)

[19] *In Re Grand Jury Subpoenas April, 1978, Etc.*, 581 F.2d at 1110; *Application of Jordan*, (S.D.W.Va. 1977) 439 F. Supp. 199, 20.

[20] *See also:*

U.S. V. Sacony-Vacuum Oil Co., (1940) 310 U.S. 150, 234; *State of Wis. v. Schaffer*, (7th Cir. 1977) 565 F.2d 961, 967; *U.S. Industries, Inc. v. United States District Court*, (9th Cir. 1965) 345 F.2d 18, 21, *cert. denied*, 382 U.S. 814; *Beatrice Foods Co. v. United States*, (8th Cir. 1963) 312 F.2d 29, 38, *cert. denied*, 373 U.S. 904.

In *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. at 234, the court said:

". . . after the grand jury's functions are ended, disclosure [of grand jury materials] is wholly proper where the ends of justice require it."

It was on these principles that the district court bottomed its denial of disclosure in this proceeding, finding that the State Attorney General, before he is entitled to disclosure, must show a "particularized need" and that assistance in evaluating or maintaining another legal action such as the State Attorney General contemplates is not such a "particularized need" as is comprehended within the rule as determined in *Proctor & Gamble* and *Douglas Oil, supra.* But what the district court overlooked was that we are not here concerned with a request for disclosure by a *private* party interested in *private litigation*, which was the situation in all the cases relied on by it. The requirements for disclosure, and particularly the showing of a "particularized need" as declared in these private cases are clearly inapplicable here. The applicant for disclosure in this case is the chief law enforcement officer of a State, who has been specifically invested, as a matter of federal public policy as formally expressed in an Act of Congress, with the capacity to maintain a *parens patriae* federal antitrust suit in aid of the small consumer and, in order to encourage and assist him in such undertaking, the Congress has specifically directed the Attorney General to furnish him (the State attorney general), to "the full extent permitted by law," all the materials in the former's files "which are or may be relevant or material to the actual or potential" *parens patriae* cause of action. The State Attorney General has been thus explicitly clothed by the Congress with this power and right because he is given a place adjunct to that of the Attorney General himself, in the scheme of enforcement of the federal antitrust laws, directed especially to protecting the small consumer.[21] When Congress has thus explic-

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In *U.S Industries v. United States District Court*, 345 F.2d at 21, the court put it:

> "In other words, if the reasons for maintaining secrecy do not apply at all in a given situation, or apply to only an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need."

[21] There is some similarity here with the power given by Rule 6(e) to disclose grand jury materials "to the attorneys for the government for use in the performance of their duties." In such a case, there is no need for the attorney to show a "particularized need" as a necessary predicate for disclosure of grand jury materials. *In Re December 1974 Term Grand Jury Investigation*, (D.Md. 1978) 449 F.Supp. 743, 750.

itly stated the legitimate and proper need of the State attorney general for the disclosure of such materials, it has resolved the public interests consideration in such a case and, in so doing, it accordingly relieved that official of the requirement of establishing a "particularized need" as a threshold condition to disclosure. And this is the view taken by the only other United States Court of Appeals which has confronted this issue. *United States v. Goodrich, supra.*

In reaching this conclusion we would not be understood as holding that a State attorney general has, under the statute, an absolute right to disclosure. We hold only that, first, grand jury materials are "investigative files" within the intent of § 15f(b), 15 U.S.C., and, secondly, that the State Attorney General, in his *parens patriae* capacity, has been relieved by Congress of the initial burden of showing a "particularized need" as a basis for a grant of disclosure, and that the burden of opposing disclosure in such a situation rests on those who would deny disclosure. Whether the showing by the opponents of disclosure is sufficient in any particular case to deny disclosure remains a matter for the discretion of the district judge, which, however, may not be exercised arbitrarily but only on plainly articulated reasons. Moreover, the district court may, and should, in the interest of fairness to all parties concerned, "include [such] protective limitations on the use of the disclosed materials," as may be appropriate under the peculiar facts of each case. It is interesting that the appellants proposed in this case that any disclosure of the grand jury materials ordered should be subject to reasonable "protective limitations."

Since the district court did not apply the standards above stated for deciding the appellants' motion for disclosure, the cause must be remanded to the district court for reconsideration in the light of the standards for deciding such motion as hereinabove set forth.

REMANDED WITH INSTRUCTIONS.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

UNITED STATES OF AMERICA,	]	
	]	
Plaintiff	]	
v.	]	CRIMINAL ACTION
COLONIAL CHEVROLET CORP., ET AL.,	]	*NO. 78-106-N*
	]	
	]	
Defendants	]	

MEMORANDUM OPINION

Background

In 1978 a federal grand jury convened by this Court heard from witnesses concerning the alleged collusive practices of automobile body shop operators in establishing hourly rates for work done therein. In September 1978 the grand jury returned indictments against seven such operators and the Tidewater Automobile Dealers Association, charging them with conspiracy, to violate the Sherman Antitrust Act. In December 1978 this Court accepted *nolo contendere* pleas from the eight defendants and awarded appropriate punishment.

In March of 1979, the Attorney General of Virginia is before the Court seeking from the United States Attorney ". . . all his investigative files or other materials relevant to the criminal action, making the request pursuant to paragraph 4F(b) of the Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 15F(b)."

PREVIOUS PAGE WAS BLANK

Whatever other investigative files the United States Attorney may have turned over to the Virginia authorities, the matter here being sought is limited to the disclosure of the year long grand jury materials and transcripts.

The secrecy of grand jury proceedings is partly found in Rule 6(e) of the Federal Rules of Criminal Procedure, which provides:

> "(e) *Secrecy of Proceedings and Disclosure—*
>
> (1) *General Rule* — A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. . ."

The Attorney General of Virginia recognized that ". . . the secrecy of grand jury proceedings is a sold as this common law institution itself . . ." He also agrees that a primary authority on the subject at hand is *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983 (1958). That case provides that a disclosure of grand jury records might be allowed if the requesting party established a *"compelling need."* Two "compelling needs" are cited: (1) that the disclosure of the extensive grand jury materials would be of great aid to the Attorney General and would provide Virginia with valuable investigative materials to assist in determining whether a civil antitrust suit should be filed; and (2) insisting that § 4F(b) of the Clayton Act, as amended by the Hart-Scott-Rodino Antitrust Improvement Act of 1976, is of itself a statutory compelling force or need in favor of the Attorney General of Virginia to receive such grand jury materials. Section 4F(b) provides as follows:

> "(a) . . .
>
> "(b) To assist a State Attorney General in evaluating the notice [provided under 15 U.S.C. § 15(a)] or in bringing any action under sections 12 to 27 of this title, the Attorney General of the United States shall, upon

request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under sections 12 to 27 of this title."

The disclosure of the grand jury testimony is opposed by Tidewater Automobile Dealers Association and others on grounds that the State does not seek the requested material in connection with any pending action but rather has as its purpose the obtaining of "valuable investigative materials" for use in considering whether to file and in preparing a future *parens patriae* civil suit. A reading of the State's memorandum would indicate that the antitrust suit contemplated is not only against the eight indicted defendants, but against any or all of the automobile body shop operators who may have testified during the grand jury investigation.

The sanctity of grand jury proceedings, as reflected by Rule 6(e) is indeed a hallmark of our common law. The United States Supreme Court in *United States v. Proctor & Gamble Co., supra,* in 1958 recognized that such secrecy was fundamental to the integrity of the grand jury as an institution. In *Pittsburgh Plate Glass Company v. United States,* 360 U.S. 395, 399-400, 79 S.Ct. 1237 (1959), Mr. Justice Clarke could say that the establishment of the grand jury as a concept in the Constitution itself illustrated the high place it held as an instrument of justice. "Ever since this action by the Fathers, the American grand jury, like that of England, 'has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.' Indeed, indictments may be returned on hearsay, or for that matter, even on the knowledge of the grand jurors themselves. *To make public any part of its proceedings would inevitably detract from its efficacy.* Grand jurors would not act with that independence required of an accusatory and inquisitorial body." 360 U.S. at 399-400. [Emphasis added.]

The stated basic need for secrecy being unchallenged, the immediate query to be answered is whether there is a *compelling necessity* to depart from that secrecy and whether the need for disclosure of the record is shown with *particularity*. *United States v. Proctor & Gamble Co., supra.*

In both oral argument, and in his brief, the Attorney General of Virginia insisted that the public interest would be served by his being able to review the grand jury material for antitrust violations, both as to indicted defendants and others who may have testified before the grand jury. In oral argument, his emphasis was put upon the time to be saved in having the grand jury material available as opposed to the State proceeding on its own. It should be noted that he has been furnished the information he originally sought, *i.e.*, the names of all witnesses who appeared before the grand jury.

We find that Virginia's asserted need for this investigative information is neither *compelling* nor *particularized*. A similar claim of need was raised in *United States v. Proctor & Gamble Co., supra*, where the government sought to use grand jury transcripts for preparation of a civil antitrust suit. The Supreme Court held that such use was not a particularized or compelling need justifying release of the transcript, saying:

> "The relevancy and usefulness of the testimony sought were, of course, sufficiently established. If the grand jury transcript was made available, discovery through depositions, which might involve delay and substantial cost would be avoided. Yet these showings fall short of proof that without a transcript a defense would be greatly prejudiced or that without reference to it an injustice would be done."

In *Proctor & Gamble* the Supreme Court suggested that a proper use of grand jury transcripts might be to impeach a witness or to refresh his recollection or to test his credibility, but wholesale

disclosure of grand jury records for investigating purposes was not sufficient. Of like content, in *ABC Great Stores, Inc. v. Globe Ticket Co.*, 309 F.Supp. 181 (E.D. Pa. 1970), the Court said:

> ". . . Although . . . sympathetic to the plaintiff's position, the law requires that before the need of grand jury secrecy may be lifted, the parties seeking disclosure must demonstrate a more compelling and particularized need than merely expediting civil discovery." 309 F.Supp at 183.

And in *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D.Minn. 1968), the Court said that discovery for civil antitrust litigation was not such a "particularized need" as to depart from accepted grand jury secrecy:

> "The normal routes of civil discovery will give plaintiffs adequate opportunity to prepare their case. Mere savings of monetary burden will not suffice to bring the court's discretion into play under Rule 6(e). 44 F.R.D. at 581.

In the face of the fact that the Supreme Court has vigilantly recognized the policy of grand jury secrecy as expressed in *United States v. Proctor & Gamble Co., supra*, the State does not linger long on its argument that a compelling necessity exists in that it would avoid expense and additional work in conducting its own discovery. It immediately moves to the proposition that Section 4F(b) of the Clayton Act, 15 U.S.C. § 15F(b), is in itself a statutory and stated compelling need which is sufficient to require disclosure. Even a cursory reading of Section 4F(b) provides the answer to the State's position when it says:

"The United States shall, upon request of the State attorney general, make available to him, to the *extent permitted by law*, any investigative files or other materials . . ." [Emphasis added.]

Such language serves to return the discretion granted to the district court under Rule 6(e). To argue otherwise would be to eliminate the district court from any discretion in the matter and deny the argument of compelling need as contained in *United States v. Proctor & Gamble Co., supra.* A reading of the legislative history advances the same conclusion. During the final Senate debate on the Hart-Scott-Rodino Antitrust Improvement Act of 1976, Senator Abourezk said about section 4F(b):

> "The section specifically limits the Attorney General's power to release documents to whatever his powers are under existing law. *Under existing law, he cannot turn over materials given in response to a grand jury demand or to a civil investigative demand.* Therefore, the section is limited by existing law to cases where materials were turned over voluntarily . . ." 122 Cong. Rec. S 15, 333 (daily ed. Sept. 7, 1976). [Emphasis added.]

In the Matter of Grand Jury Which Presented Criminal Indictments 76-149 and 77-72 In The Middle District of Pennsylvania, (M.D. Pa. Nov. 14, 1978), is background for a like holding wherein the court, in denying a motion for grand jury records, said:

> "[W]e do not read 'investigative files or other materials' as including grand jury materials nor do we believe the statute [4F(b)] was intended to repeal Rule 6(e) or the time-honored policy of grand jury secrecy."

More recently, Mr. Justice Powell stated the matter this way in *Douglas Oil Co. of California v. Petrol Stops Northwest,* 47 U.S.L.W. 4416, 4418 (April 18, 1979):

> "We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. *See, e.g., United States v. Proctor & Gamble,* 356 U.S. 677 (1958). [Footnote omitted.] In particular, we have noted several distinct interests served by safeguarding the confi-

dentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vóte against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but found innocent by the grand jury will not be held up to public ridicule. [Footnote omitted.]"

In this case, many individuals, most of them not necessarily connected with the eight defendants later indicted, came before the grand jury, assured of the secrecy of their testimony, and secure in the promise that they could testify frankly without fear or initimidation. One can assume that many were informed that they were not "targets" in the investigation itself. The announced rule of the secrecy of their testimony and the necessity not to break faith with the persons so appearing, in our opinion, far outreaches any compelling need of the Attorney General of Virginia for this Court to broach the time honored rule of secrecy and to make available the grand jury testimony just to save him effort and time in conducting an investigation upon which he *may* base antitrust suits.

The motion is DENIED.

United States District Judge

Norfolk, Virginia
May 23, 1979.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 1980, three copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, to each of the following:

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I further certify that all parties required to be served have been served.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-785

CERTAIN UNINDICTED INDIVIDUALS
AND CORPORATIONS,
Petitioners

v.

UNITED STATES OF AMERICA,
COMMONWEALTH OF VIRGINIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

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QUESTION PRESENTED

Whether Section 4F(b) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 requires a state attorney general to show a "compelling and particularized need" when he moves for disclosure of federal grand jury materials.

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STATUTES

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BRIEF IN OPPOSITION ON BEHALF OF THE COMMONWEALTH OF VIRGINIA

The Commonwealth of Virginia, respondent herein, respectfully requests that this Court deny the petition for writ of certiorari.

STATUTES AND RULES INVOLVED

United States Code, Title 15:

§ 15f. Actions by Attorney General

(b) To assist a State attorney general in evaluating the notice or in bringing any action under Sections 12 to 27 of this title, the Attorney General of the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under Sections 12 to 27 of this title.

Federal Rules of Criminal Procedure, Rule 6(e)(3)(C).

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

STATEMENT OF THE CASE

In 1977 a federal grand jury was impanelled in the Eastern District of Virginia to conduct an investigation into price fixing activities by automobile dealerships and the Tidewater Automobile Dealers Association (TADA). The grand jury indicted seven dealerships and TADA charging them with conspiracy to fix the labor rates on automobile body repair work. All defendants entered pleas of *nolo contendere*. The court accepted those pleas and fined the defendants.

The Attorney General of Virginia filed a request with the United States Attorney General, pursuant to Section 4F(b) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15f(b), [hereinafter 4F(b)] for all "investigative files or other materials" relating to the price fixing conspiracy charged in the indictments. The Department of Justice agreed that the Commonwealth was entitled to the materials, but stated that a court order was necessary before it could release them. The Commonwealth and the United States jointly moved for disclosure of the grand jury materials and requested a protective order limiting the Commonwealth's use of the materials to the investigation and prosecution of civil antitrust actions. Any disclosure beyond the stated use was to remain strictly prohibited.

The district court rejected the argument of the Commonwealth and the United States that 4F(b) of the Clayton Act was meant to apply to Rule 6(e) of the Federal Rules of Criminal Procedure and denied the joint motion for disclosure. Access was denied to all of the grand jury materials and to the bills of particulars.

From the district court's denial of relief the Commonwealth and the United States appealed to the Fourth Circuit. After full briefing and argument by all parties, including the unindicted parties, the Fourth Circuit remanded the case to the district court with instructions to reconsider in light of the standards set forth in its opinion of August 12, 1980.

The standards adopted by the Court of Appeals removed from the Attorney General of Virginia the requirement that a "particularized need" be shown as a prerequisite to disclosure of federal grand jury materials. The burden of opposing disclosure was placed on the parties seeking to deny disclosure to the Attorney General, and the Court of Appeals did not differentiate indicted from unindicted parties. A writ of certiorari is now sought by an unidentified group of automobile dealers who appeared before the grand jury but were not indicted.

REASONS FOR DENYING THE WRIT

I.

THE FOURTH CIRCUIT'S ANALYSIS OF THE DISCLOSURE STANDARD APPLICABLE TO A STATE ATTORNEY GENERAL IS CONSISTENT WITH THE PRIOR HOLDINGS OF THIS COURT.

The Fourth Circuit held that Congress, by means of 4F(b), has relieved the state attorney general of the requirement of establishing "particularized need" as a threshold condition to disclosure of grand jury materials. In their effort to persuade this Court to exercise its jurisdiction, petitioners suggest that the decision below is in conflict with prior Supreme Court decisions. Two cases, *Douglas Oil Co. of California* v. *Petrol Stops Northwest,* 441 U.S. 211 (1979), and *United States* v. *Proctor & Gamble Co.,* 356 U.S. 677 (1958), are characterized by petitioners as controlling precedents ignored by the Fourth Circuit in the case at bar. To the contrary, neither case examined the point of law which has been raised by the Commonwealth of Virginia's request for grand jury materials.

Douglas Oil involved the efforts of a private, non-governmental antitrust plaintiff to gain access to grand jury transcripts developed during a Department of Justice investigation. Justice Powell, writing for the majority, pointedly limited the issues before the Court: "This case presents . . . questions concerning a civil litigant's right to obtain transcripts of federal criminal grand jury proceedings . . . [W]hat justification for disclosure must a *private party* show in order to overcome the presumption of grand jury secrecy applicable to such transcripts?" 441 U.S. at 213. [Footnotes omitted, emphasis added]. The Court also limited its holding to the precise facts of the case, reemphasizing the private status of the plaintiff. *Id.* at 223.

The second case relied on by petitioners, *Proctor & Gamble,* is similarly inapplicable to the present situation. In that case, a private defendant was the subject of a Department of Justice grand jury investigation. The grand jury failed to return an indictment, and the Department of Justice chose to pursue a civil antitrust suit against the defendant. The defendant moved, pursuant to Fed. R. Civ. P. 34, for production and discovery of grand jury materials. The district court ordered the government to produce the grand jury transcripts. This Court reversed, finding that the defendant had failed to make a sufficient showing of "good cause" under Rule 34.

As in *Douglas Oil,* the party moving for production of grand jury materials in *Proctor & Gamble* was a private litigant. Neither opinion addresses the congressionally recognized relationship between federal and state antitrust enforcement officers or the effect which the passage of 4F(b) was intended to have on the construction of Rule 6(e).

Pervasive throughout Title III of the Hart-Scott-Rodino Act is the clear recognition by Congress that criminal investigations and prosecutions by the United States *must* be accompanied by civil enforcement actions for treble damages by the states, through sections 4 and 4C of the Clayton Act, in order to effectuate the policies of the antitrust laws. *See* H.R. Rep. No. 94-499, 94th Cong., 2nd Sess. 4 (1975), reprinted in 1976 U.S. Code Cong. & Admin. News at 2572, 2573-4. *See also* Sherman, *The Law of Antitrust* 770 (1977) ("[T]here can be little doubt that private [treble damage] actions are a major part of the nation's antitrust enforcement program."); Posner, *Antitrust Law* 227-32 (1976). To this end, the attorneys general of the several states were given the right to bring a *parens patriae* action on behalf of state residents damaged by violations of the federal antitrust laws. 15 U.S.C. § 15c. In addition, state attorneys general were given a right of access to federal investigative materials through § 4F(b) of the Clayton Act. Congress recognized that the enforcement responsibilities vested in the states by the Hart-Scott-Rodino Act can only be

fulfulled if the states are able to benefit from materials developed in federal investigations. The standard adopted by the Fourth Circuit to regulate the disclosure process recognizes the needs of innocent parties while eliminating barriers which impede state access to federal grand jury materials.

The legislative history specifically involving 4F(b) is sparse. This section was proposed by the House of Representatives, consequently the written House Report is the best-reasoned exposition of the purpose of the section. The House Report dealt with an earlier version of § 4F which applied only to *parens patriae* actions.[1] It states:

SECTION 4F

> Section 4F promotes *parens patriae* actions as a major aspect of antitrust enforcement by *encouraging Federal-State cooperation* . . . . *Whenever* a State attorney general so requests, in order to evaluate the notice from the U.S. Attorney General or in order to bring a *parens patriae* action, *section 4F(b) requires* the U.S. Attorney General to make the Justice Department's investigative files available to the State attorneys general 'to the extent permitted by law.' This means that *the files are to be made available except where specifically prohibited.*
>
> *Section 4F(b) reflects the Committee's desire that the Federal Government cooperate fully with the State antitrust enforcers.*
>
> *The benefits of increases in Federal-State cooperation* and coordination of antitrust enforcement *are obvious,* and are achieved in H.R. 8532 without the expenditure of additional Federal funds.

---

[1] Section 4F was eventually expanded to cover actions brought under either section 4 *or* 4C. This expansion reflects the desire of Congress to make available to the States *all* information "except where *specifically* prohibited."

H.R. Rep. No. 94-499, 94th Cong., 2nd Sess. 17 (1975), reprinted in 1976 U.S. Code Cong. & Admin. News at 2586-7. [Emphasis added].

The district court relied heavily on remarks made by Senator Abourezk during a heated floor debate to conclude that the state attorney general could not have access to grand jury materials unless Rule 6(e) standards were met. The Fourth Circuit concluded that the Senator's remarks meant only that under Fed. R. Crim. P. 6(e), the Attorney General could not *voluntarily* turn over such materials to a state attorney general. Opinion of the Fourth Circuit (Pet., p. A6-7). Nonetheless, disclosure "under existing law" may be authorized by the court under the circumstances outlined in Fed. R. Crim. P. 6(e)(3). *Id.*

Thus having analyzed Rule 6(e) in the context of 4F(b), the Fourth Circuit held:

> When Congress has thus explicitly stated the legitimate and proper need of the State attorney general for the disclosure of such materials, it has resolved the public interests consideration in such a case and, in so doing, it accordingly relieved that official of the requirement of establishing a "particularized need" as a threshold condition to disclosure.

Opinion of the Fourth Circuit (Pet., p. A12). The court analogized its special treatment of state attorneys general under 4F(b) to the treatment of government attorneys under Rule 6(e)(3). Neither situation requires a showing of particularized need. Opinion of the Fourth Circuit (Pet., p. A12 n. 21). The Fourth Circuit's determination, therefore in no way conflicts with either the law or policies underlying the *Proctor & Gamble* and *Petrol Stops* decisions.

II.

THERE IS NO CONFLICT BETWEEN THE CIRCUIT COURTS WHICH HAVE ADDRESSED THE ISSUE IN THIS CASE.

Two Courts of Appeals have addressed the issue presented in this case. Both the Court below and the Court of Appeals for the Ninth Circuit have determined that 4F(b) removes the burden of showing a particularized need from the State Attorney General who seeks access to grand jury materials.

In *United States v. B.F. Goodrich,* 619 F.2d 798 (9th Cir. 1980), the Ninth Circuit determined that "(T)he need for access to grand jury materials is greater for States than for ordinary individuals because of the important place State Attorneys General occupy in Congress' scheme for antitrust enforcement." 619 F.2d 798, 801. The Court held that 4F(b) "impliedly directs the Attorney General of the United States to disclose grand jury materials to State Attorneys General without the showing of particularized and compelling need which is normally required by Rule 6(e)." *Id.* This approach accommodates the special interest of state attorneys general, while recognizing the need for continued district court discretion pursuant to Rule 6(e).

In the opinion below, the Fourth Circuit amplified the result reached by the 9th Circuit in *B.F. Goodrich.* Judge Russell thoroughly examined the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The Court then reviewed the manner in which federal courts have treated Rule 6(e), taking into account the relevant decisions of this Court. The holding of the Fourth Circuit is a precise, internally consistent, and well-reasoned accommodation of the policies underlying both Rule 6(e) and 4F(b):

> We hold only that, first, grand jury materials are "investigative files" within the intent of § 15f(b), 15 U.S.C., and, secondly, that the State Attorney General, in his *parens patriae* capacity, has been relieved by Congress of the initial burden of showing a "particularized need" as a basis for a grant of disclosure and that the burden of opposing disclosure in such a situation rests on those who would deny disclosure. Whether the showing by the opponents of disclosure is sufficient in any particular case to deny disclosure remains a matter for the discretion of the district judge, which, however, may not be exercised arbitrarily but only on plainly articulated reasons. Moreover, the district court may, and should, in the interest of fairness to all parties concerned, "include [such] protective limitations on the use of the disclosed materials," as may be appropriate under the peculiar facts of each case. It is interesting that the appellants proposed in this case that any disclosure of the grand jury materials ordered should be subject to reasonable "protective limitations."

Opinion of the Fourth Circuit (Pet., p. A13).

At the district court level, three courts have ordered disclosure of grand jury materials to a state attorney general under 4F(b). *United States v. Campbell Hardware, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,794 (D.Mass. 1979), *United States v. B.F. Goodrich Co.*, 1978-2 Trade Cases (CCH) ¶ 62,389 (N.D.Cal. 1978); *In re Montgomery Co. Real Estate Antitrust Litigation*, 452 F.Supp. 54 (D.Md. 1978). In *Goodrich* and *Campbell Hardware*, the courts determined, after briefing and argument, that the attorneys general seeking access to grand jury materials should be allowed to inspect and copy transcripts and documents. From the summary nature of the orders in the two cases, it is clear that neither court was hesitant to release grand jury materials. The *Montgomery County* case is the most complete analysis of 4F(b) yet undertaken by a

district court. It is in complete harmony with the Ninth Circuit's *B.F. Goodrich* opinion and the opinion of the Fourth Circuit below.

The petitioners place heavy reliance on two cases to support their contention that there is a split in lower court interpretation of 4F(b). In both cases it is apparent that consideration of 4F(b) was a secondary issue. The first decision is *In The Matter Of Grand Jury Which Presented Criminal Indictments 76-149 and 77-72 In The Middle District Of Pennsylvania,* 469 F. Supp. 666 (M.D.Pa. 1978). In that case, Pennsylvania moved pursuant to Rule 6(e) for access to grand jury materials, and the motion was denied. Before the State filed its motion it had already received the grand jury materials relating to six corporate defendants, as well as the testimony and record of the criminal trial of one individual defendant. The court briefly discussed 4F(b), but a careful reading of the case reveals that an application of the facts to the traditional Rule 6(e) standard was the point on which the case turned. The *Montgomery County* decision was not discussed by the Pennsylvania Court.

In *Little Rock School District v. Borden, Inc.,* 1979-2 Trade Cases (CCH) ¶ 62,809 (E.D. Ark. 1979), the State of Arkansas moved pursuant to Rule 6(e) for the disclosure of the grand jury testimony of two previously immunized witnesses. As in the Pennsylvania case just discussed, the State Attorney General was already in possession of some federal grand jury materials at the time of his motion. Again, 4F(b) was argued as a secondary line of justification for disclosure, and the court did not discuss it at length. In *Little Rock* and in the Pennsylvania *Grand Jury* case, it does not appear that the attorney general of a sovereign State was investigating or bringing an action pursuant to his *parens patriae* powers. Rather, the suits were brought by the States in a proprietary capacity.

Taken as a whole, the cases which have examined the meaning of 4F(b) in a fully developed posture have determined that Congress intended to remove the "compelling and particularized need" burden from State attorneys general. The only aberration appears in the opinion of the District Court for the Eastern District of Virginia below. The two facially inconsistent opinions, *Little Rock* and *Grand Jury,* are factually distinct and both treated 4F(b) as a secondary matter. There is no reason to conclude on the basis of decided federal cases that the case at bar presents a proper situation for the exercise of certiorari jurisdiction by this Court.

III.

THE DISTRICT COURT IS THE BEST FORUM FOR RESOLVING THIS CASE IN ITS PRESENT POSTURE.

The unindicted parties who seek review of the Fourth Circuit's decision are asking the Court to consider a legal standard which has not been applied to the facts of this case. Rather than determine the outcome of Virginia's motion in a factual vacuum, the appellate court properly remanded the case for reconsideration in light of the correct rule of law. The Supreme Court will be in a better position to consider the merits of the Fourth Circuit's rule after the rule has been tested at a practical level in the district court.

CONCLUSION

Petitioners have failed to demonstrate any compelling reason for this Court to grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Although the relationship between 4F(b) and Rule 6(e) is a question of great importance to state antitrust enforcement efforts, the courts which have ruled on the issue have done so in harmony with one another and in keeping with the grand jury secrecy

standards pronounced by this Court. For these reasons, a writ of certiorari should not issue to review the judgment of the Fourth Circuit.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Respondent

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CERTIFICATE OF SERVICE

CERTAIN UNINDICTED INDIVIDUALS
AND CORPORATIONS

v.

UNITED STATES OF AMERICA,
COMMONWEALTH OF VIRGINIA

I hereby certify that on this 17th day of December, 1980, in accordance with Rule 28 of the Rules of the Supreme Court of the United States, three copies of the Commonwealth of Virginia's Brief in Opposition were mailed, first-class postage prepaid, to the following:

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No. 80-785

In the Supreme Court of the United States

OCTOBER TERM, 1980

CERTAIN UNINDICTED INDIVIDUALS AND CORPORATIONS,
PETITIONERS

v.

UNITED STATES OF AMERICA AND
COMMONWEALTH OF VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Rule 6(e) of the Federal Rules of Criminal Procedure, construed in harmony with Section 4F(b) of the Antitrust Improvements Act of 1976, 15 U.S.C. 15f(b), permits state attorneys general an opportunity to seek access to federal grand jury materials without demonstrating particularized need.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 629 F. 2d 943. The opinion of the district court (Pet. App. A14-A20) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1980. The petition for a writ of certiorari was filed on November 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In September, 1978, a grand jury indicted seven corporations and the Tidewater Automobile Dealers Association for price fixing in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The defendants all pled nolo contendere and were sentenced. Thereafter, the Attorney General of Virginia, supported by the United States, moved for disclosure of grand jury materials, subject to a proper protective order, in furtherance of an antitrust investigation. The district court denied the motion (Pet. App. A14, A20).

In a unanimous opinion, the court of appeals reversed and remanded. Examining the purpose and legislative history of Section 4F(b) of the Antitrust Improvements Act of 1976, 15 U.S.C. 15f(b), the court discerned a transcendent goal of assisting state attorneys general in the public enforcement of the antitrust laws to the benefit of small consumers (Pet. App. A5). Fidelity to this policy, the court reasoned, compelled two conclusions: that grand jury materials fell within the ambit of Section 4F(b); and that Section 4F(b) permitted state attorneys general pursuing antitrust investigations to obtain access to grand jury materials without a showing of particularized need (*id.* at A6-A13). The court emphasized, however, that district courts possess power under Fed. R. Crim. P. 6(e) to deny disclosure if opponents

demonstrate a sufficient threat of harm to interests safeguarded by grand jury secrecy and that the district courts should impose appropriate protective orders on any disclosure to state attorneys general (*id.* at A13). The court of appeals remanded the case to the district court for reconsideration of the Virginia Attorney General's Rule 6(e) motion in light of the standards it had expounded.[1]

ARGUMENT

The decision of the court of appeals is correct and raises no conflict with any decision of this Court or any court of appeals. Moreover, the court of appeals did not order the disclosure of grand jury materials; proceedings on remand will determine whether such disclosure will occur. Further review by this Court is therefore unwarranted.

1. Review of the decision of the court of appeals at this time would be premature. Although petitioners dispute the correctness of the court of appeals' decision, it is undisputed that the court did not direct the disclosure of any grand jury documents. Rather, it remanded the case to the district court for a hearing in which petitioners will have a meaningful opportunity to resist disclosure. After this hearing, the district court may deny the motion for disclosure. If it does, petitioners' complaint about a potential lifting of grand jury secrecy would be mooted. Thus, even if the issues which petitioners raise would otherwise merit review (but see pages 3-5, *infra*), review at this stage of the proceedings would be premature.

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[1]The court denied petitioners' motion for a stay of mandate pending application to this Court for a writ of certiorari. The Chief Justice denied an identical motion.

2. Petitioners erroneously suggest (Pet. 4-5, 10-13) that the decision of the court of appeals disavowed the standards expounded in *Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. 211 (1979), and *United States* v. *Procter & Gamble Co.,* 356 U.S. 677 (1958), for disclosing grand jury materials under Fed. R. Crim. P. 6(e). As the court of appeals correctly noted (Pet. App. A10), both *Douglas Oil* and *Procter & Gamble* endorsed a "particularized need" standard for disclosure when Rule 6(e) materials are sought by private parties for use in private litigation. Here however, it is the attorney general of a state who has made the Rule 6(e) request, and he buttresses his request with the congressional policy favoring disclosure incorporated in Section 4F(b) of the Antitrust Improvements Act.

Section 4F(b) is an essential element of a broad congressional scheme endowing state attorneys general with special authority to enforce the antitrust laws. Companion provisions empower state attorneys general to bring antitrust actions, acting *parens patriae,* on behalf of consumers (15 U.S.C. 15c), relax evidentiary standards for proving damages in such cases (15 U.S.C. 15d), and sanction the allocation of aggregate damages to compensate injured consumers or the payment of such damages into the state treasury as a civil penalty (15 U.S.C. 15e).

Sections 4F(a) and (b) acknowledge the congressionally favored status of state attorneys general in initiating *parens patriae* suits by directing the United States Attorney General to offer them investigative assistance. The Attorney General of the United States is required, "[w]henever [he] has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action [under this *parens patriae* authority] based substantially on the same alleged violation of the antitrust laws," to "promptly give written notification thereof to such State attorney general" (15 U.S.C. 15f(a)).

Moreover, "[t]o assist a State attorney general in evaluating the notice [of the federal antitrust action] or in bringing any [*parens patriae*] action * * * the Attorney General of the United States shall, upon request of such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action * * *" (15 U.S.C. 15f(b)). The enforcement efforts of the state attorneys general would be severly impaired if grand jury materials could not be disclosed to them for these purposes.

The Court stated in *Douglas Oil* that disclosure of grand jury materials may be appropriate where the need for it outweighs the public interest in secrecy and that "the court's duty in a case of this kind is to weigh carefully the competing interests in light of the relevant circumstances and the standards announced by this Court" (441 U.S. at 223). Given the statutory commands just discussed and the congressional policy to encourage antitrust enforcement by state attorneys general, the court of appeals properly concluded that the balance in this case between the interest in grand jury secrecy and the public interest in disclosure of grand jury materials is far different from that involved in *Douglas Oil* and *Procter & Gamble,* which involved requests by private parties.

3. Moreover, contrary to petitioners' contention (Pet. 14-15), the ruling of the court of appeals is supported by the language and legislative history of Section 4F(b). That Section directs the United States Attorney General to disclose to his state counterparts investigative files or other pertinent antitrust materials "to the extent permitted by law * * *." As the court of appeals noted (Pet. App. A6-A9), the weight of legislative history compels the conclusion that Congress intended such antitrust files and materials to be

available to state attorneys general except where specifically prohibited by law.[2] Rule 6(e) does not *prohibit* all disclosure of grand jury materials; to the contrary, it permits limited disclosure under various circumstances (Pet. App. A9). Accordingly, the court of appeals correctly construed Rule 6(e) as permitting disclosure of grand jury materials to state attorneys general in proper cases to effectuate their congressionally conferred authority to initiate antitrust actions.

The court of appeals carefully balanced both the interests in grand jury secrecy identified in *Douglas Oil Co.* v. *Petrol Stops Northwest, supra,* and the congressional policy to promote public enforcement of the antitrust laws articulated in Section 4F(b) of the Antitrust Improvements Act. Thus it held that state attorneys general, with the support of the United States, need not demonstrate particularized need as a predicate to disclosure, but it also stressed that district courts should deny access under Rule 6(e) if an opponent demonstrates a sufficient likelihood and gravity of harm to the interests furthered by continued secrecy. Moreover, the court of appeals underscored the responsibility of district courts to limit disclosure under Rule 6(e) by employing appropriate protective orders (Pet. App. A13). This reconciliation of the concern for the secret operation of grand juries and for federal antitrust enforcement policy is eminently sensible. It is also harmonious with the view of the Ninth Circuit in *United States* v. *B. F. Goodrich Co.*, 619 F. 2d 798 (1980), the only other court of appeals to have addressed the issue.

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[2]Petitioners' reliance on the remarks of Senator Abourezk (Pet. 15) is misplaced. As the court of appeals explained (Pet. App. A6-A8), the remarks did not address the authority of federal district courts to release materials, the question raised in this case, and, in any event, were less authoritative than contrary statements of members of the House whence Section 4F(b) originated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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